PRIVY COUNCIL.

Present: Viscount Sumner, Lord Atkinson, Lord Sinha, Sir John Wallis and Sir Lancelot Sanderson.

CHUNNA MAL-RAM NATH

versus

MOOL CHAND-RAM BHAGAT.

1928

Feb. 13.

Privy Council Appeal No 80 of 1927.

(High Court, Lahore, Appeal No. 621 of 1924.)

Indian Contract Act, IX of 1872, section 63—Promisee dispensing with Performance—Sale of Goods—Purchaser cancelling Contract—Subsequent suit by Purchaser.

Under section 63 of the Indian Contract Act, 1872, the performance, in whole or in part, of a contract may be effectually dispensed with by the promisee, without either an agreement by the promisor, or consideration for the dispensation.

By a contract made in India in November 1916, the respondents sold to the appellants cotton goods in tin-lined cases which the respondents were importing from England by shipments between May and November, 1917. In April, 1917, the export of goods from England in tin-lined cases was prohibited. The respondents wrote to the appellants proposing to deliver the goods in bales, but the appellants by repeated letters cancelled the contract. Subsequently they demanded delivery, and sued for damages for breach of the contract.

Held, that the appellants had dispensed with delivery, and consequently could not maintain the suit.

Abaji Sitaram Modak v. *Trimbak Municipality* (1), disapproved.

Decree of the High Court affirmed.

Appeal (No. 80 of 1927) from a decree of the High Court (January 5, 1925) reversing a decree of the Senior Subordinate Judge of Delhi.

(1) (1903) I. L. R. 28 Bom. 66.

1928

CHUNNA MAL-RAM NATH v. MOOL CHAND-RAM BHAGAT.

The appellants brought a suit against the respondents in May 1920 claiming damages for breach of contract in failing to deliver goods under a contract of sale made in 1916.

Th facts of the case appear from the judgment of the Judicial Committee.

The trial Judge made a decree for Rs. 47,737 damages. Both parties appealed to the High Court, the defendants contending that they were under no liability, and the plaintiffs contending that the damages awarded were insufficient.

The defendants' appeal was allowed by the High Court, and the suit dismissed. The learned Judges (Harrison and Campbell J.J.) were of opinion that the plaintiffs were entitled to put an end to the contract under section 39 of the Indian Contract Act, 1872, and had done so. They considered also that the suit was not maintainable having regard to section 63.

DE GRUYTHER K. C. and WALLACH for the Appellants.

SIR GEORGE LOWNDES K. C. and DUBE for the Respondents.

Reference was made to the Indian Contract Act, sections 39, 56, 63. *Bradley* v. *Newson Sons & Co.* (1) and *Abaji Sitaram Modak* v. *Trimbak Municipality* (2).

The judgment of their Lordships was delivered by :—

LORD ATKINSON.—This is an appeal from decrees of the High Court of Judicature at Lahore, dated the 5th January, 1925, which reversed the decree of

(1) (1919) A. C. 16. (2) (1903) I. L. R. 28 Bom. 66.

1928

CHUNNA MAL-RAM NATH v. MOOL CHAND-RAM BHAGAT.

the Senior Subordinate Judge of Delhi, dated the 14th January, 1924, and dismissed the suit of the plaintiff with costs.

The suit out of which this appeal has arisen was one claiming damages for the non-delivery by the respondents of certain goods which the latter had agreed to sell and the appellants had agreed to purchase.

The principal question for decision in the appeal is whether under the circumstances proved in the case the plaintiffs are entitled to recover damages from the respondents for the alleged breach of their contract for the sale and delivery of the aforesaid goods.

In the order of Court of the Subordinate Judge of Delhi, dated the 9th of August, 1921, it is stated that the respondents (the defendants) had presented for the second time an application to be at liberty to add a plea that the plaintiffs were not ready or willing to perform their part of the contract entered into between the parties, and *apropos* of this application the Court said:—

"The real question in dispute is whether, in face of the correspondence, could the plaintiff claim damages and could he consider the contract as subsisting. These points are covered by the issues already framed by me. If I find that the contract was cancelled and the plaintiff could not claim damages, the point as to readiness and willingness would not arise.

"If it is held by me that the contract subsisted, the question, as to readiness and willingness would not crop up. We have got letters sent by the defendant that he considered the contract as cancelled, and if I hold that he was not justified in considering the contract as cancelled, he had no *locus standi* to

raise the plea as to the want of readiness and willingness on the part of the plaintiff."

The material parts of the aforesaid contract, which was dated the 29th November, 1916, and is very lengthy, ran as follows :—

" We had purchased one hundred and fifty (150) cases of white shirting marked D.-1 May to November, *i.e.*, seven shipments, of the office of R. J. Wood, at 20*s.* 2*d.* We have sold the same to you at a net profit of Re. 0-4-0 per piece. The patterns and the invoices of the goods will be given to you on receipt. You shall have to take delivery of the goods on payment of their price to the Bank. You shall have to remove the goods on compliance with the condition of the office of R. J. Wood. You shall have to pay interest and godown rent according to the terms of the office of R. J. Wood. Besides, you shall have to bear all the expenses incurred. The goods shall be fresh.

" Contract made on Mangsir Sudi 5, Sambat 1973, through Moti Ram-Ram Kishan, Brokers.

" (Sd.) MUL CHAND-RAM BHAGAT.

" Contract in respect of 140 (one hundred and forty) cases confirmed."

It is common ground that a case marked " D.-1 " means a tin-lined case containing 50 pieces of Messrs. R. J. Wood & Co.'s shirting, manufactured in England, and the goods the subject of the said contract were sold by Messrs. R. J. Wood & Co. to the respondents, and were to be as so packed for export.

The plaint is verified by the appellants. In its sixteenth paragraph it is alleged, and apparently not disputed by the respondents, that the shipment of the portion of the goods which should have arrived in

1926

CHUNNA MAL-RAM NATH v. MOOL CHAND-RAM BHAGAT.

India in the months of May and June, 1917, did not arrive till the month of March, 1918. The shipments which should have been made in July and August, 1917, did not arrive till June, 1918, and those of September, October and November, 1917, did not arrive till July, 1918.

On the 24th April, 1917 (*i.e.*, after the date of the said contract, but before the first shipment thereunder), an Order in Council was issued in London prohibiting the export of cotton goods in tin and wooden cases to India, and this was followed by a similar prohibition by the Government of India.

On the 28th April, 1917, the importers, Messrs. R. J. Wood & Co., wrote to the respondents as follows :—

"As the British Government prohibited the use of wood and tin cases, kindly note that all your goods on order will come out packed in bales instead of cases until such prohibition is withdrawn ; if we do not hear from you within three days we shall understand you agree to this. If not, kindly instruct us how to send the goods out."

On the same day the respondents wrote to the appellants a letter to the following effect :—

"As the British Government have prohibited the use of wood and tin cases, kindly note, that all your goods on order will come out packed in bales in place of cases unless such prohibition is withdrawn. If we do not hear from you within three days we shall understand you agree to this. If not, kindly instruct us how to send the goods out."

On the 1st of May, 1917, the respondents wrote to the appellants a letter in the following terms :—

"We are in receipt of your favour of date, and in reply have to say that, having sold Messrs. R. J.

Wood's goods to different parties, we cannot confirm the letter by sending it to you. If you are so very anxious to see the letter, you are quite welcome to come and see it at our shop. We have already sent you a copy of this letter, and if you will not come to our shop to satisfy yourself, please note we shall not be responsible. Please further note that, if we will not hear from you definitely in the matter within the allotted time, you will be responsible for all consequences."

In reply to this letter the appellants on the same day wrote to the respondents a letter running thus :—

" With reference to your letter, we beg to inform you that we do not agree to take the goods sold by you to us in bales instead of cases. Hence we cancel the goods, which please note."

Cancel the goods is not an accurate expression, and in this connection must mean cancel the contract entitling us to receive the goods.

To this letter the respondents on the 2nd of May replied in the following terms :—

" We are in receipt of your letter dated 1st May, 1917, and in reply have to say that we sold you goods as per Messrs. R. J. Wood's terms, and as that office is going to ship goods in bales instead of cases, you are bound to abide with these terms and accept goods in bales. Please note that you are not bound to cancel the goods, and you will have to accept goods in bales as required by Messrs. R. J. Wood."

On the 4th of May, 1917, the appellants again wrote to the respondents thus :—

" In reply to your letter of the 1st of May, we beg to tell you that we . . . . have cancelled the goods, and we again inform you. Please note."

1928

CHUNNA MAL-RAM NATH v. MOOL CHAND-RAM BHAGAT.

On the 4th of May the appellants replied in the following terms to the respondents' letter of the 2nd of May (which they must have received on the 3rd of that month). Their letter runs thus :—

"In reply to your letter of the 3rd of May, we cannot accept the goods in bales instead of cases and tins. Please consider them as cancelled. Please note, once for all, as our dealers do not agree, we cannot accept."

On the 8th of May the appellants again wrote to the respondents a letter in the following terms :—

"*Re* our previous correspondence, we beg to tell you that we have cancelled all goods ordered through you, and we will not take at any stake, and also note we have reason and authority to cancel, and hence we will not at all be responsible for the delivery, which please note."

The appellants could not have been more emphatic in repudiating any obligation to accept bales and in refusing to be bound by or to perform it. If delivery of the shirting, packed in bales, was in confirmity with the contract, the appellants clearly declared that they would not accept them, and this was acquiesced in by the respondents.

No evidence was given establishing that the goods purchased by the appellants could not have been safely shipped and carried to their destination, though packed in bales instead of in wooden boxes lined with tin. The lower Court was of opinion that packing in these cases was not part of the description of the goods sold. The High Court, on the contrary, expressed the opinion, grounded on the authority of the cases of *Bowes* v. *Shand* (1), and the case of *In re Moore & Co.* (2), that the packing of the goods in such

(1) (1877) 2 A. C. 455. (2) (1921) 2 K. B. 519.

cases was part of the description of them. Having regard to the conclusion at which their Lordships have arrived on other portions of the case, it is unnecessary to deal with this point at length or to express any definite opinion upon it.

Sections 39 and 63 of the Indian Contract Act (reading with those sections the meaning to be given to "contract", "promise" and "promise" as laid down in section 2) run thus :—

39. "When a party to an agreement enforceable by law has refused to perform or disabled himself from performing an accepted proposal in its entirety, the person accepting the proposal may put an end to the agreement enforceable by law unless he has signified by words or conduct his acquiescence in its continuance."

63. "Every person who accepts a proposal may dispense with or remit wholly or in part the performance of the proposal made to him which he has accepted, or he may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit."

The contentions raised on these sections were as follows. The respondents, relying on sections 39 and 63, said that the appellants had put an end to the agreement and had expressly dispensed them from delivery at all. The appellants contended that section 63 applied only where there was an agreement to dispense or a contract, supported by consideration, to do so, and that in any case it could only operate, when the party dispensing had performed his part of the contract and only something remained to be performed on the other side, unless dispensed with (*Abaji Sitaram*

1928

CHUNNA MAL-RAM NATH v. MOOL CHAND-RAM BHAGAT.

Modak v. *Trimbak Municipality* (1)). They further said that, if they had been wrong in refusing in advance to accept bales, this repudiation had not been accepted by the respondents, and therefore the contract remained alive and ought to have been performed. It is evident that the alleged dispensation under section 63 is by itself a complete answer, unless the absence of contract or consideration is fatal, for the appellants again and again dispensed with the performance by the respondents of their promise to deliver the goods contracted for, and they cannot recover damages for the breach of a promise touching the performance of a thing they wholly dispense with.

In *Abaji Sitaram Modak* v. *Trimbak Municipality* (1), Jenkins C. J., deals with section 63, and holds that the promisee mentioned in section 63, can only do the acts he is by that section empowered to do, if there be an agreement (as defined by section 2 (*e*)) amongst the parties to that effect. The learned Chief Justice is reported to have expressed himself thus :—

" Therefore we hold that, assuming there was a legal resolution, and that it was communicated as alleged, still, inasmuch as a dispensation or remission under section 63 requires an agreement or contract, the resolution was of no legal effect since the provisions of section 30 of Bombay Act II of 1884 have not been observed."

With this their Lordships are unable to agree. The language of the section does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines. On this they agree with the learned Judges of the High Court.

(1) (1903) I. L. R. 28 Bom. 66.

1928

CHUNNA MAL-RAM NATH
v.
MOOL CHAND-RAM BHAGAT

They are therefore of opinion that the appeal fails and should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitor for appellants, *T. W. Wilson & Co.*

Solicitor for respondents, *Ranken, Ford & Charters.*

A. M. T.

APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Bhide.

EAST INDIAN RAILWAY CO., CALCUTTA (DEFENDANT) Appellant

versus

RAHIM ULLAH-ELAHI BAKHSH (PLAINTIFFS) Respondents.

1928

Feb. 15.

Civil Appeal No. 756 of 1925.

Civil Procedure Code, Act V of 1908, section 80—Indian Limitation Act, IX of 1908, section 15 (2)—Notice given to defendant under section 80 of the Code of Civil Procedure—whether plaintiff entitled to deduct that period from period of limitation in the suit—Single suit against several defendants—plaintiff entitled to deduct certain period from limitation against one—his right to deduct the same against others.

Goods were delivered to Eastern Bengal State Railway on the 11th of August, 1920, for being carried to Katni on the East Indian Railway *en route* to Sabzimandi (near Delhi). Two days later the wagon containing the consignment arrived at a junction station of E. B. S. Railway, and four days later it started on E. I. Railway for Katni, reaching there a month later. The next day it was rebooked from that place to Sabzimandi (on the E. I. R.) and arrived there on 2nd of October 1920 in a rotten condition and the consignees (plaintiffs) refused to take delivery. The usual notices followed, including a notice under section 80 of the Code of Civil Procedure given by the plaintiffs to the Secretary of State for India in connection with the liability of